Supreme Court, U.S.
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No. 95-1475

In the Supreme Court of the United States

OCTOBER TERM, 1995

WINSTON & STRAWN, *Petitioner*

v.

HYATT REGENCY PHOENIX HOTEL COMPANY, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of Arizona

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

As we explained in the petition (and as respondents do not dispute), the $3 million punitive exaction in this case bears no relationship to either the innocent conduct of Winston & Strawn or even the so-called malpractice of Arthur Greenfield. Indeed, because Winston & Strawn indisputably did nothing wrong, there simply is no way in which the alarming amount of punishment imposed against it could be said to be reasonably necessary to accomplish Arizona's interests in retribution and deterrence. Notably, respondents do not even attempt to argue otherwise. The arguments that they do make fall far short of justifying the extraordinary action of denying the petition without awaiting the disposition of *BMW*.

1. Respondents' principal contention is that the issue presented was not raised below. See Opp. 13-17. That contention is predicated upon a fundamental misunderstanding of the question presented. Contrary to respondents' perception (Opp. 13), the question presented is not whether "*respondeat* liability for punitive damages requires some special non-*Haslip* federal due process analysis." Rather, we present a straightforward excessiveness challenge to the $3 million exaction. To be sure, the question refers to the fact that liability was purely vicarious, but that reference merely draws the Court's attention to one aspect of the case that makes the punishment especially outrageous. The petition itself discusses multiple factors that mandate the same conclusion. It is frankly impossible to read the petition and conclude that the issue presented involves some kind of "special" due process challenge to the imposition of vicarious liability.

Respondents acknowledge that Winston & Strawn has a preserved due process challenge to the amount of punitive damages. See Opp. 15 ("the only federal question which could be presented to this Court consistently with Winston & Strawn's statement of the question presented and its arguments below is whether a 2 or 3:1 ratio [of punitive to

compensatory damages] is *ipso facto* precluded by due process"); *id.* at 9 ("the only actual question presented is whether a 2 or 3:1 ratio of punitive to compensatory damages * * * *ipso facto* violates due process"). Although we disagree with the way in which respondents have framed the issue, there can be no doubt that it fully encompasses the issue presented in the petition.

2. In an effort to avoid having the petition held during the pendency of ***BMW,*** respondents emphasize that this case, unlike ***BMW,*** does not involve "repetitive conduct." Opp. 10, 11. But the fact that there were other individuals affected by BMW's conduct is an affirmative *justification* by Dr. Gore for the $2 million exaction in ***BMW*** (albeit one that BMW contends cannot properly be used to support the judgment). The *absence* of a similar justification here is hardly grounds for claiming that the petition should be denied without awaiting the outcome of ***BMW.***

3. In the petition (at 21-22), we demonstrated that the punitive damages are disproportionate to the harm to respondents caused by Greenfield after he joined Winston & Strawn. That disproportionality, we contended, is an important indication of the excessiveness of the $3 million exaction.

Respondents urge this Court to ignore our showing because the Court of Appeals concluded that there was substantial evidence from which the jury could have found that, but for Greenfield's continuing malpractice, "HRP could have significantly reduced its liability in the [underlying] litigation." Opp. 10 (quoting Pet. App. 19a). Importantly, however, the Court of Appeals' statement did not purport to be a finding of fact regarding the *quantum* of damages fairly attributable to conduct occurring after Greenfield joined Winston & Strawn. Rather, the court's statement was made in response to the argument that HRP suffered *no* damages as a result of such conduct and therefore lacked a basis for

recovering *any* punitive damages against Winston & Strawn. See Pet. App. 17a-18a.

Thus, the Court of Appeals simply did not address the question whether the evidence could support a finding that the full amount of HRP's compensatory damages is the correct measure of the harm caused by misconduct occurring after Greenfield joined Winston & Strawn. Indeed, any suggestion that Greenfield's conduct in the period after he joined Winston & Strawn was a but-for cause of most or all of HRP's damages would have been demonstrably incorrect. To begin with, respondents' own experts conceded that, by the time Greenfield joined Winston & Strawn, there was nothing that could have been done to relieve HRP of liability and that, at most, HRP could have been spared a few months of damages for wrongful detention of the forms. See Pet. 10-11. Those witnesses did not, and could not, testify that, a full year after the trial and three months after the Special Master announced his liability finding,[1] HRP could have taken some eleventh-hour corrective action that would have changed the Special Master's mind and caused him to relieve it of liability.

The Court of Appeals majority identified two continuing acts of alleged malpractice that it believed could have been rectified even after Greenfield joined Winston & Strawn — Greenfield's adherence to the disclosed principal argument and his failure to invoke the AIA contract as a defense against Form-Eze and Inryco and as a basis for a cross-claim for indemnification against Chanen. There is no basis, however, for concluding that the mere continuation of these two alleged acts of malpractice caused HRP's injury. First, Greenfield's

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[1] Although respondents ignore it, they stipulated at trial that, on December 8, 1980 — *i.e.*, three months before Greenfield joined Winston & Strawn — "the Special Master stated at a hearing that he had found in favor of Form-Eze and Inryco against both Chanen and HRP." 5/13 Tr. 96.

adherence to the disclosed principal argument had no effect whatever on the outcome because the Special Master *rejected* that contention. See P. Exh. 109, ¶¶ 6, 69. Second, putting aside the extreme unlikeliness that the Special Master would have allowed HRP to raise a brand new defense one year *after* trial,[2] the proposition that Form-Eze and Inryco could have their rights of recovery limited by a contract to which they were not parties is manifestly unsound. As for invoking the AIA contract as a basis for a cross-claim for indemnification, HRP had every right to bring such a claim after the proceedings concluded, but chose not to. What is more, the AIA contract required that disputes between HRP and Chanen be submitted to arbitration, not litigated as a cross-claim. See P. Exh. 2, AIA Document A201, ¶ 7.10.1. There simply was no basis whatever on which a rational jury could have concluded that HRP was in any way harmed by the fact that the cross-claim was not presented during the three-month period between the date Greenfield joined Winston & Strawn and the date the Special Master rendered his ruling.

In short, it belies common sense to suggest that, even though Greenfield did not join Winston & Strawn until after the Special Master had expressly determined to impose liability jointly and severally against HRP and Chanen, the reasonableness of Winston & Strawn's punishment should be measured against the full amount of HRP's compensatory damages. This Court is not obliged to accept the Court of Appeals' statements relating to an entirely different issue in evaluating whether the punishment is excessive.

4. The only other point in the opposition that merits response is the contention (Opp. 5-6, 18-19) that this was not a case of pure vicarious liability. To begin with, we remind the Court that, during the hearing on the post-trial motions, respondents expressly agreed with the trial court's statement

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[2] It bears emphasis that the record contains no evidence to support such an unlikely assumption.

that "the only basis for punitive damages against Winston & Strawn was * * * the conduct of Art Greenfield. It wasn't a claim that he was negligently hired or retained or supervised." Pet. App. 46a-47a. Respondents do not contend otherwise here. Instead, they state that punitive damages were permissible because (1) under general principles of partnership law, the conduct of any partner can be treated as the conduct of the partnership for purposes of imposing punitive damages; (2) Greenfield managed HRP's case and thus could be said to have occupied a managerial position for purposes of the Restatement's standard for vicarious imposition of punitive damages; and (3) Arizona partnership law makes partnerships liable for any penalty incurred by a partner acting in the ordinary course of the partnership's business. It takes no more than a moment's reflection to realize that all of these are means for imposing liability vicariously. None have anything to do with whether the partnership bore any fault itself.[3]

In any event, the issue here is not whether liability for punitive damages may be imposed at all, but rather whether the amount imposed was unreasonably and grossly excessive. The undisputed fact that Winston & Strawn itself engaged in no misconduct surely should be relevant to that inquiry.

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[3] Respondents also place reliance (Opp. 6) upon Winston & Strawn's opening statement, which invited the jurors to "find against" both Greenfield and Winston & Strawn if they were to conclude that Greenfield lacked integrity and tried to prefer Chanen over HRP. Given that the trial court had already held that Winston & Strawn was fully responsible for all *compensatory* damages arising out of malpractice that took place when Greenfield was with CG&I (see Pet. App. 28a-29a), it is perfectly understandable that, in opening statements, Winston & Strawn would tie itself to Greenfield. That hardly constitutes a concession that Winston & Strawn itself was guilty of any misconduct.

CONCLUSION

At the end of the day, the punishment in this case remains a paradigm of excessiveness. It bears no relationship to the gravity of either Winston & Strawn's innocent conduct or even Greenfield's negligent misconduct. It is utterly disproportionate to any harm suffered by HRP as a consequence of conduct occurring after Greenfield joined Winston & Strawn. It is dozens of times greater than whatever "profits" Winston & Strawn earned from Greenfield's joint representation of Chanen and HRP. And it cannot seriously be thought to be reasonably necessary to further Arizona's interests in deterring and punishing malpractice. If the Court reaches the excessiveness issue in *BMW*, its ruling in that case surely will impact upon the validity of the punishment against Winston & Strawn. If the Court does not reach the excessiveness issue in *BMW*, the present case would be an appropriate one in which to do so. The petition for certiorari should be granted.

Respectfully submitted.

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